UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCI, and HAIGHT
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist ANTHONY J. PEREZ
United States Army, Appellant

ARMY 20130368

Headquarters, 7th Infantry Division
Thomas P. Molloy, Military Judge
Lieutenant Colonel Michael S. Devine, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Robert N. Michaels, JA; Captain Brian D. Andes, JA (on brief).

For Appellee: Colonel John P. Carroll, JA; Major John K. Choike, JA; Captain Jaclyn E. Shea, JA (on brief).

7 April 2015

SUMMARY DISPOSITION

HAIGHT, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of absence without leave and four specifications of assault consummated by a battery upon a child under 16 years, in violation of Articles 86 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 928 [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for eight months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

This case is before us for review pursuant to Article 66, UCMJ. Appellant raises one assignment of error concerning dilatory post-trial processing that merits neither discussion nor relief. Appellant personally raises several matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that are also without merit. However, one additional issue warrants discussion and relief.

BACKGROUND

On an afternoon in early August 2012, appellant was at a neighbor's on-post quarters along with his wife, their young daughter, and the neighbor's ten-month old daughter, LT. Appellant and his wife were babysitting, and after appellant's daughter fell asleep in a crib downstairs, his wife returned to their residence "to go get something to eat real quick and then she was going to come back." While appellant's wife was away, appellant went upstairs because LT was crying and "wasn't going down for a nap." Appellant removed LT from her crib, placed her on the floor, and started to play a "game" in which he repeatedly pushed her down, said "Boom," and then lifted her back up to her feet, causing her to laugh. On the third iteration, appellant pushed LT "too hard, causing her to fall back, hit[ting] her lower back, head and face" against the crib. Appellant admitted that this push to the little girl's chest was too hard, unlawful, and done with "culpable negligence." After this first battery, all appellant "wanted her to do was to just stop crying and to play with [him] more." He felt he was "not good enough as a parent" and then "grabbed [LT] by her ankles at that point and [] dragged her [face-down] about three feet over to in front of her bouncer." It was only a matter of seconds between the time appellant pushed LT down against her crib and when he dragged her across the floor.

After being dragged, the infant was still "crying and did not want to play with [appellant] and did not want to play with her toys." Appellant picked LT up and put her in the crib. When appellant picked her up, he squeezed her too hard and left bruises on her torso. Appellant admitted that this squeezing was done out of frustration, without legal justification, and with culpable negligence. Finally, after placing LT in her crib but "right before [appellant] walked out" of the room, he pinched the crying baby on her right upper arm, hurting her. Regarding the final pinch, appellant testified he was frustrated, "not thinking right," and did not have an answer for why he did it. Appellant admitted that all four touchings were committed unlawfully and with culpable negligence.

For this misconduct, appellant was charged with, pleaded guilty to, and convicted of four individual assault specifications. However, the military judge agreed with the parties to merge the four assault specifications for sentencing purposes. The military judge specifically reasoned that the multiple charges in this case may exaggerate appellant's criminality and probably increased appellant's punitive exposure unfairly. In so reasoning, the military judge acknowledged that the criminal acts described in the multiple specifications all occurred within a short span of time "without opportunity for the accused to leave the room or allow him to regain his composure."

Although the military judge did consider the four assault specifications as but one offense for purposes of sentencing, appellant remains convicted of four assaults.

LAW AND DISCUSSION

Unreasonable Multiplication of Charges

Under the circumstances of this case, appellant should not be separately convicted of four separate assault offenses for unlawfully pushing, dragging, squeezing, and pinching LT within a single transaction.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4). The prohibition against unreasonable multiplication of charges "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001); *see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). In *Quiroz*, our superior court listed five factors to guide our analysis of whether charges have been unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?; and
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

55 M.J. 338-39 (internal quotation marks and citation omitted).

Here, the military judge analyzed all of the above factors and determined that while merging for sentencing purposes was appropriate, the appellant should remain convicted of separate specifications. Such a ruling is perfectly permissible, but one exchange during the providence inquiry causes us concern and leads us to merge the specifications for findings as well. The military judge asked appellant, "And did you commit these offenses as a single act or did you do each one separately?" To this question the accused simply replied, "Single act, Your Honor." Similarly,

appellant then asserted that all four offenses were committed out of a "single impulse."

As appellant's unrebutted admission and the record as a whole in this case both reflect that the assaults were committed as a single act under a single impulse, we will combine "the operative language from each specification into a single specification that adequately reflects each conviction." *United States v. Thomas*, 74 M.J. 563, 569 (N-M Ct. Crim. App. 2014); *see also United States v. Clarke*, __ M.J. __, (Army Ct. Crim. App. 20 March 2015).

CONCLUSION

Specifications 2, 3, 4, and 5 of Charge I are consolidated into a single assault specification, numbered Specification 2 of Charge I, to read as follows:

> Charge I, Specification 2: In that Specialist (E-4) Anthony J. Perez, U.S. Army, did, at or near Joint Base Lewis-McChord, Washington, on or about 6 August 2012, unlawfully push L.T., a child under the age of 16 years, on the chest with his hands; unlawfully drag the same L.T. along the floor by her feet with his hands; unlawfully squeeze the same L.T. on the torso with his hands; and unlawfully pinch the same L.T. on the arm with his fingers.

The findings of guilty to Specification 2 of Charge I, as so consolidated, and Charge I are AFFIRMED. The findings of guilty to Specifications 3, 4, and 5 of Charge I are set aside and those specifications are DISMISSED. The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

In evaluating the *Winckelmann* factors, we first find no dramatic change in the penalty landscape that might cause us pause in reassessing appellant's sentence, as the military judge merged Specifications 2, 3, 4, and 5 of Charge I for sentencing purposes. Second, appellant was tried and sentenced by a military judge alone. Third, the nature of the remaining consolidated offense still captures the gravamen of the original offenses. Finally, based on our experience, we are familiar with the remaining offenses so that we may reliably determine what sentence would have been imposed at trial. We are confident that based on the entire record and

appellant's course of conduct, the military judge sitting alone as a general court-martial would have imposed a sentence of at least that which was adjudged.

Reassessing the sentence based on the noted error and the entire record, we AFFIRM the approved sentence. We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision are ordered restored.

Senior Judge COOK and Judge TELLITOCCI concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court